

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

**HILSON & FERGUSSON, INC. AND  
HFH, INC.**

**Employer<sup>1[1]</sup>**

**and**

**Cases 12-RC-9118  
12-RC-9119**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 79, AFL-CIO**

**Petitioner<sup>2[2]</sup>**

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTIONS**

The Employer has a contract with DHL Express (DHL) to provide parcel pickup and delivery services at its Sarasota, Florida and Naples, Florida facilities. On April 21, 2005, the Petitioner, International Brotherhood of Teamsters, Local 79, AFL-CIO, filed two petitions seeking to represent units of all full-time and regular part-time drivers and dock workers employed at these two facilities.<sup>3[3]</sup>

Although the parties are in agreement that separate units of drivers and dock workers are appropriate, they disagree as to whether or not certain drivers employed at each facility should be excluded from the respective units because they are independent contractors. The Employer contends that these drivers are independent contractors and therefore not employees within the meaning of Section 2(3) of the National Labor

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<sup>1[1]</sup> The parties stipulated at the hearing that, at all material times, Hilson & Fergusson, Inc. and HFH, Inc., collectively called the Employer, have been affiliated business enterprises with common officers, ownership, directors, management and supervision; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. Based on this stipulation, I find that Hilson & Fergusson, Inc. and HFH, Inc. constitute a single integrated business enterprise and a single employer within the meaning of the Act, and I will refer to this single employer as "the Employer."

<sup>2[2]</sup> The name of the Petitioner appears as stipulated to at the hearing.

<sup>3[3]</sup> The only difference between the petitions is the location of the facility. The unit in Case 12-RC-9118 is employed at the Sarasota facility, while the unit in Case 12-RC-9119 is employed at the Naples facility.

Relations Act, as amended (the Act), while the Petitioner claims that they are statutory employees.<sup>4[4]</sup> I will refer to these disputed drivers as the “contract drivers,” to distinguish them from the remaining drivers at each facility, whom both parties agree are statutory employees, and whom I shall call “employee drivers.” The Employer alternatively argues that the contract drivers are supervisors within the meaning of Section 2(11) of the Act, while the Petitioner disputes this contention.

A hearing was held in Tampa, Florida on May 5-6 and May 11, 2005. Testimony was provided by the Employer’s Director of Operations David O’Donnell, Sarasota contract drivers Wes Mitchell, Jose Feliciano and Michael Arnold, former Sarasota contract driver William Dingley, and Naples contract drivers Julie Feast and Elie Pierre. I have considered all of the evidence and the arguments presented by the parties.<sup>5[5]</sup> Based upon the record and the relevant law, I conclude that the evidence is insufficient to establish that the contract drivers are independent contractors. However, I shall permit contract drivers Michael Arnold and Shahzaan Alit to vote subject to challenge. I also conclude that there is insufficient evidence to establish that any contract drivers are the Employer’s supervisors.

In the discussion below, I will provide an overview of the Employer’s operations, followed by a detailed description of the drivers. I will then analyze the facts and provide the reasoning in support of my conclusions.

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<sup>4[4]</sup> The parties agree that the dock workers are statutory employees.

<sup>5[5]</sup> The briefs of the parties have been fully considered as well. I decline to grant the Employer’s Motion to Strike Attachments to Brief, seeking to strike certain attachments to the Petitioner’s brief. However, I note that, in making my decision here, I rely on the facts in the record before me, not on any preconceived conclusion that because other contract drivers serving DHL customers were found or agreed to be employees, the contract drivers in this case must also be found to be employees.

## **Overview of the Employer's Operations at Sarasota and Naples**

O'Donnell is responsible for 11 facilities including Sarasota and Naples. Robbie Hunsucker is the station manager<sup>6[6]</sup> in Sarasota. Corey Ogg and Brent Barnett are supervisors. Calvin Sloan is the station manager in Naples. Milton Fuller, Roberto Sein and Robert Stevens are supervisors.<sup>7[7]</sup> DHL also has a manager at each station,<sup>8[8]</sup> and an office staff in Sarasota. Neither party contends that DHL supervises the drivers at issue.

There are 27 contract drivers, 16 full-time employee drivers, 3 full-time employee cover drivers, 3 part-time employee drivers and 6 part-time dock workers in Sarasota. There are 22 contract drivers, 7 full-time employee drivers, 4 part-time employee drivers and no dock workers in Naples. As explained more fully below, certain contract drivers at each facility hire substitutes, also referred to as "cover drivers," to perform their routes. One Sarasota contract driver (Michael Arnold) employs three cover drivers regularly, and one Naples contract driver (Shahzaan Ali) appears to employ one cover driver regularly.<sup>9[9]</sup>

Each station operates Monday through Saturday and consists of a warehouse attached to an office. The office contains restrooms and a vending machine used by all drivers. Packages begin to arrive at 5:30 a.m. or 6:00 a.m. by DHL truck from other DHL facilities and from the airport. Dockworkers place them on the sorting belt,<sup>10[10]</sup> a conveyor belt stretching the length of the warehouse. Drivers<sup>11[11]</sup> are required to report in time for the morning sort, before the sorting belt starts running. Drivers back their

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<sup>6[6]</sup> The Employer refers to its Sarasota and Naples facilities as stations.

<sup>7[7]</sup> The parties stipulated, and I find based on the record as a whole, that Hunsucker, Ogg, Barnett, Sloan, Fuller, Sein and Stevens are all supervisors within the meaning of Section 2(11) of the Act.

<sup>8[8]</sup> DHL owns the Sarasota facility, while the Employer leases the Naples facility and is reimbursed by DHL.

<sup>9[9]</sup> I will address the eligibility of these cover drivers later.

<sup>10[10]</sup> O'Donnell testified that supervisors also perform this function.

<sup>11[11]</sup> Whenever I use the word "drivers," I mean both contract drivers and employee drivers. Where appropriate, I will refer specifically to contract drivers or employee drivers.

vans up three feet from the belt. The belt starts running at 7:30 a.m. in Sarasota and 8:00 a.m. in Naples. Once the belt starts, drivers remove the packages addressed to customers on their routes. Each route corresponds to a different geographical area. The driver removes only the packages addressed to the zip codes in his geographical area.<sup>12[12]</sup> The driver then scans the packages into his scanner and loads them in his van. The sorting process takes about one and one-half to two hours, depending on the station and the volume of packages. To reduce the risk that a driver will leave without a package assigned to his route, drivers are not permitted to leave on their routes until one of the Employer's supervisors signals that the sort is finished.

DHL imposes rigid scheduling priorities for deliveries, which reflect customer demands. Packages must be delivered by 10:00 a.m., 10:30 a.m., noon, 3:00 p.m. or 5:00 p.m. Pickups are scheduled within afternoon window times, such as 3:00 p.m. to 5:00 p.m. or 4:00 p.m. to 6:00 p.m. The last scheduled pickup is at 6:00 p.m. on weekdays and at noon or 1:00 p.m. on Saturdays. Drivers scan each delivery and pickup so that they can be tracked from anywhere using DHL's computers.

After the driver's last pickup, he returns to the station to unload his pickups onto the sorting belt. Drivers must return in time for their pickups to be sorted and loaded onto DHL trucks leaving for the airport and DHL's regional sorting hubs. It appears from the record that these trucks leave at roughly 7:30 to 8:00 p.m.

Before going home, the driver must be "checked in" by a supervisor or station manager. Data that has been downloaded from the driver's scanner is checked by the supervisor to make sure all packages removed from the station in the morning were delivered and all pickups were made.

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<sup>12[12]</sup> Packages are scanned by the driver doing the pickup, and a routing code is placed on the airbill to show the destination.

## **Driver Equipment and Expenses**

### *Scanners*

The Employer issues scanners which all drivers must use.<sup>13[13]</sup> The Employer does not charge employee drivers for scanners, but deducts \$17 per week from each contract driver for their use. Scanners are equipped with lasers which track each shipment by registering the bar codes on each air bill. Scanners also have text messaging by which drivers receive additional instructions from the Employer's supervisors regarding unscheduled pickups, missed deliveries, etc.<sup>14[14]</sup> Upon returning to the station each night, all drivers must place their scanners in cradles to recharge, and must download the scanner's data to DHL computers located in each office.

The Employer does not have enough scanners, so drivers with the most volume are given priority, as are drivers whose routes are within range of the station to permit text messaging. Drivers without a scanner use paper manifests and turn in paperwork at the end of the day.

Cell phones are optional, and are supplied by the driver. Contract drivers provide their own hand trucks and pallet jacks.<sup>15[15]</sup>

### *Vans*

All drivers must drive vans painted a specific shade of yellow, displaying DHL's logo and DHL decals along the side and the Employer's name on the doors.<sup>16[16]</sup> The Employer provides employee drivers with properly painted vans,<sup>17[17]</sup> and pays for

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<sup>13[13]</sup> DHL provides these scanners to the Employer.

<sup>14[14]</sup> As explained below, their contracts require that contract drivers make "on demand" pickups and deliveries as instructed by the Employer; it appears from the record that such requests are conveyed through the scanners.

<sup>15[15]</sup> It appears from the record that the Employer provides these for employee drivers.

<sup>16[16]</sup> The "DHL" name appears in large letters across the top, with its telephone number and website below.

<sup>17[17]</sup> Employee drivers usually receive the same van each day.

maintenance, repairs, fuel<sup>18[18]</sup> and tolls. The Employer also provides vehicle and cargo insurance for employee drivers.

Contract drivers provide their own vans, which can be any make or model as long as they are cargo vans made after 1999. The Employer does not lease vans to contract drivers or otherwise assist them in purchasing their vans. Contract drivers pay for their own van registration fees, taxes, maintenance and repairs. They pay for their fuel, though they receive a small subsidy from the Employer based on their revenues. DHL requires that the Employer purchase a specific vehicle insurance policy, which covers all vans, 24 hours per day, 7 days per week. Contract drivers are required to maintain coverage under this policy. The Employer deducts the cost of this insurance from the contract driver's check.<sup>19[19]</sup> Contract drivers must also pay for cargo insurance provided by the Employer.

Contract drivers are responsible for ensuring that their vans are painted the shade of yellow required by DHL, and affixed with the DHL logo and decals supplied free of charge<sup>20[20]</sup> by DHL. As a result of DHL's requirements for "vehicle image," contract drivers cannot display any other wording on their vans, or place personal items on the dashboard or hang them from the rearview mirror.

Contract drivers can take their vans home at night; employee drivers must leave them at the station. Contract drivers can use their vans for personal reasons, with limitations; employee drivers may not. The Employer instructs contract drivers not to carry passengers in their vans, although a driver continued to transport her daughter in her van after being told this, because she believed she had no other option.<sup>21[21]</sup>

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<sup>18[18]</sup> Employee drivers receive a fuel card.

<sup>19[19]</sup> Contract drivers pay their entire deductible, while employee drivers only pay a portion.

<sup>20[20]</sup> It is not clear from the record whether the contract driver pays to have the decals affixed.

<sup>21[21]</sup> As explained below, contract drivers are permitted to hire "helpers," and it appears from the record that helpers would be permitted to ride in the vans.

### *Uniforms and Badges*

DHL supplies drivers with required uniforms free of charge. The uniform consists of a yellow DHL shirt and charcoal grey shorts or pants.<sup>22[22]</sup> Drivers are required to supply black shoes with no visible brand name insignia and plain white socks. O'Donnell testified that DHL's "driver image" requirements prohibit the use of tee-shirts with visible lettering, hair below the collar or facial hair unless it is neatly trimmed.<sup>23[23]</sup>

The Employer requires drivers to wear picture identification badges. It appears from the record that DHL supplies these or similar picture identification badges for drivers. The record contains copies of DHL identification badges for Pierre, Feast and another contract driver, each of which states that the contract driver is an "employee of" or is "employed by" the Employer.

### **Driver Hiring, Compensation and Benefits**

#### *Employee Drivers*

Applicants for employee driver positions complete a conventional application and an IRS Form W-4.<sup>24[24]</sup> They undergo criminal and driving records checks and a drug test, all of which are required by the U.S. Transportation Security Administration and the Federal Aviation Authority. Once hired, employee drivers are assigned a route.<sup>25[25]</sup>

Employee drivers are on probation for 90 days, during which they are trained in how to use the scanner, handle packages, meet the Employer's delivery priorities, etc. They also receive training in the use of the Employer's vans and fuel card, and in what O'Donnell referred to as the "dos and don'ts of what you can and can't do to be an employee." He did not identify specific examples.

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<sup>22[22]</sup> A yellow DHL hat is optional, but drivers are not allowed to wear other hats.

<sup>23[23]</sup> The Director of Operations testified that DHL is in the process of modifying the driver image requirements.

<sup>24[24]</sup> If hired, they receive an IRS Form W-2 each year.

<sup>25[25]</sup> Routes fall within designated geographical areas.

Employee drivers are paid a daily salary, from which the Employer withholds federal income tax and social security. O'Donnell testified that salaries of employee drivers average \$450 per week.<sup>26[26]</sup> They receive additional money if they work on Saturdays. Full-time employee drivers receive paid vacations and holidays. The Employer provides employee drivers with health and life insurance, and pays half of the premium. Employee drivers receive periodic performance evaluations which determine their raises.<sup>27[27]</sup> Except when they are on paid leave, employee drivers are not paid if they do not work. They cannot hire cover drivers or helpers. Employee drivers do not punch a time clock, and are allowed to take breaks whenever they choose, consistent with their delivery schedules.<sup>28[28]</sup> They must contact a supervisor or station manager if absent without notice.

#### *Contract Drivers*

Applicants for contract driver positions complete a "contractor package" consisting of several documents,<sup>29[29]</sup> including an IRS Form W-9.<sup>30[30]</sup> One document explains the "contract fulfillment" obligations and refers to the contract driver as an "independent contractor." It explains the contract driver's responsibility to provide a van and trained driver for his route when absent. If the contract driver fails to do so, the Employer runs the route with an available van or rents a truck to run the route and charges the contract driver for the rental and a 7 percent surcharge; in either case, the Employer reduces the contract driver's weekly shipment base<sup>31[31]</sup> accordingly. If neither

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<sup>26[26]</sup> The record does not reflect how the Employer determines the salaries of employee drivers, or whether they receive their pay daily, weekly or biweekly.

<sup>27[27]</sup> O'Donnell testified that evaluations are done yearly, but later testified that they are performed "on the basis of need" and that employee drivers occasionally receive raises without an evaluation.

<sup>28[28]</sup> It is not clear from the record whether the Employer deducts money from the salaries of employee drivers for failing to meet DHL's scheduling priorities.

<sup>29[29]</sup> Applicants for contract driver positions receive the same criminal and driving records checks and take the same drug test as applicants for employee driver positions.

<sup>30[30]</sup> If engaged, they receive a Form 1099 at the end of the year.

<sup>31[31]</sup> The weekly shipment base is explained below.



option is available, the Employer hires an outside courier service and charges the contract driver the cost as well as the 7 percent surcharge. Another application document seeks exemption from workers' compensation coverage and includes an affidavit of independent contractor status.

After being engaged, each contract driver is assigned a route. There is no distinction between the routes assigned to contract drivers and employee drivers. A route driven by an employee driver may be assigned later to a contract driver and vice-versa. The record contains no evidence that contract drivers can bid for routes. Contract drivers are prohibited from trading routes with each other, but can trade specific deliveries.<sup>32[32]</sup>

After being engaged but before receiving a contract, each contract driver must undergo a "familiarization period." This is a period, lasting up to 10 days, during which the contract driver rides with either an employee driver or supervisor on the route to which the contract driver is assigned. During the familiarization period, the contract driver learns how to use the scanner, handle packages, meet the Employer's delivery deadlines, etc., as with new employee drivers. The contract driver is paid \$50 per day during the familiarization period and executes a temporary agreement entitled "Addendum to Schedule A,"<sup>33[33]</sup> which identifies him as an independent contractor.

It appears from the record that the Employer decides when the contract driver is ready to drive alone. At that point, the contract driver begins driving his route using his own van. However, he still does not receive a contract. Instead, the Employer takes between two weeks and three months to determine the average weekly level of

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<sup>32[32]</sup> The record does not reflect which contract driver receives credit for a traded delivery, or is penalized if a traded delivery is late.

<sup>33[33]</sup> Schedule A is explained below.

shipments along the contract driver's route, and then sets the contract driver's "base shipment level per week."<sup>34[34]</sup>

O'Donnell defined the base level as "a level of shipments that a driver's definitely going to achieve on the weekly basis."<sup>35[35]</sup> If the route already exists, the Employer generally uses the base weekly shipment level assigned to the previous driver, regardless of whether this was a contract driver or employee driver. If the route is new, the Employer conducts a study of the average weekly level of shipments along the route in order to set the base level of shipments per week. During this period, the Employer pays the contract driver a fixed amount, which the Employer determines based on the average weekly level of shipments and the revenues from those shipments. If the actual volume of shipments is greater than the average in a given week, the contract driver receives one penny per shipment above the expected volume. Thus, the Employer refers to this as the "penny period." The penny period ends when the Employer sets the base shipment level per week; the contract driver has no input into determining this level.

Once it determines the base shipment level per week, the Employer determines the "base rate per shipment." The record does not clearly reflect how the Employer performs this calculation. O'Donnell testified that after establishing the base shipment level per week, the Employer "would take that number and marry that to a starting dollar figure that we would assign to an individual route based on geographical area, miles, volume. And then we would break it down into a price per ... shipment equation." It

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<sup>34[34]</sup> A shipment (also referred to by the Employer as an airbill) is defined in the contract driver's contract as "any piece or pieces, having the same ship date, moving from any single [DHL] shipper destined for any single [DHL] consignee address." Thus a shipment can consist of more than one package, and a customer can have more than one shipment. O'Donnell testified to this effect.

<sup>35[35]</sup> O'Donnell testified that after determining the average shipment level per week, the Employer determines the base "off of that number which is generally a number that regardless of fluctuation, there's no doubt they're going to achieve."

therefore appears that the Employer divides the base shipment level per week by an amount of dollars determined by the revenue from that route, yielding the base rate per shipment. It further appears that the contract driver is guaranteed a level of weekly compensation equal to the base shipment level per week multiplied by the base rate per shipment, unless he fails to satisfy the performance requirements of the contract explained below. Contract drivers receive no paid leave and no health or life insurance or other benefits.

After determining the base shipment level per week and the base rate per shipment, the Employer inserts them into the contract driver's Schedule A, which is the final contract. The Schedule A also identifies the contract driver's "threshold rate per shipment," which is the amount the Employer pays per shipment in excess of the base shipment level per week. The threshold rate per shipment for almost every contract driver is \$.20. In other words, contract drivers receive \$.20 for each shipment they handle in excess of their base weekly shipment level. As explained below, this is far less than the base rate per shipment for each contract driver.<sup>36[36]</sup>

O'Donnell testified that there have been instances when the base rate per shipment was adjusted at a contract driver's request, but gave no examples. He also testified that the Employer generally presents contract drivers with a contract to accept or reject, without negotiation. Mitchell testified that when he asked his supervisors to renegotiate his contract and increase his gas subsidy, they said they did not negotiate. Pierre testified that the Employer handed him his contract without explaining the base rate per shipment or the base level of shipments per week, and that he had no ability to negotiate these numbers. Another driver, Feliciano, testified that when he increased his

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<sup>36[36]</sup> Each Schedule A also contains identical figures for the "weight break" and the "rate per CWT over weight break." The weight break is 500 pounds per shipment for each contract driver. The rate per CWT over weight break is the contract driver's compensation per 100 pounds in excess of 500 pounds, and equals \$1.50 for each contract driver. In other words, a contract driver receives \$1.50 more for a shipment weighing 600 pounds.

volume of business, he was told by a supervisor that he was making too much money and his pay was going to be reduced; after he complained to DHL, the Employer increased his earnings somewhat.

Other than the base rate per shipment and base shipment level per week, every Schedule A contains identical performance terms. For example, the contract driver must meet the delivery priorities specified by DHL and the Employer.<sup>37[37]</sup> If he does not, the contract driver may be penalized with a 20 percent reduction in his base rate per shipment for the late shipment. The Employer can decide to waive this penalty if timely delivery cannot be made “due to circumstances beyond the control” of the contract driver. The Employer decides whether a late delivery was beyond the contract driver’s control.<sup>38[38]</sup> The Employer applies the same standard when deciding whether to penalize contract drivers for late pickups. The contract driver must also provide “on demand” pickup and delivery service, which requires unscheduled stops.<sup>39[39]</sup> The work week is defined as Monday through Saturday. In any week when DHL observes a holiday, 80 per cent of the base shipment level is used to determine when the threshold rate applies.

Every Schedule A contains identical termination provisions.<sup>40[40]</sup> Although the contract is of indefinite duration, either party can terminate for what it considers a “material breach” by providing the other party a written notice identifying the breach and 15 days to “cure” the breach. Either party may also terminate “without cause” by providing a 30-day written notice.

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<sup>37[37]</sup> The Schedule A in the record does not reflect the 10:00 a.m. and 10:30 a.m. deadlines identified in the testimony of witnesses.

<sup>38[38]</sup> O’Donnell cited late arrival by the incoming DHL plane as a circumstance beyond the contract driver’s control.

<sup>39[39]</sup> O’Donnell testified that customers often call in new pickups, and this information is relayed to the contract driver on his scanner.

<sup>40[40]</sup> In short, all contracts are the same except for the base rate per shipment and base shipment level per week.

Several contract drivers testified that the Employer unilaterally restructured their contracts without notice. Pierre testified that his route was unilaterally adjusted by a Naples station manager. Mitchell testified that Sarasota station managers modified the rates in his contract several times, and he did not find out until he saw his next paycheck. Feast testified that she had the same experience in Naples. Mitchell also testified that a Sarasota station manager reconfigured his route without his input.

O'Donnell testified that a contract driver can refuse deliveries and refuse to serve particular customers, although this testimony appears to contradict the "contract fulfillment" document signed by contract drivers. He testified that the contract driver may be charged for a courier or otherwise penalized financially in such cases, and that if it happens repeatedly, the Employer may terminate the contract.

#### *Current Contracts in Sarasota and Naples*

The record contains most of the contracts currently in effect.<sup>41[41]</sup> In both Sarasota and Naples, base rates per shipment decrease as base shipment levels per week increase, so that weekly compensation falls within fairly narrow ranges.

In Sarasota, all contract drivers are assigned single routes except Arnold, who has three. Base shipment levels per week vary from 100 to 880 for the contract drivers with one route, while their base rates per shipment vary from \$.89, (for the contract driver whose base level is 880), to \$8.50, (for the contract driver whose base level is 100). Arnold's base shipment level per week is 2,700 and his base rate per shipment is \$.95. Other than Arnold, contract drivers in Sarasota receive between \$775 and \$864 per week.

In Naples, all contract drivers are assigned one route except Shahzaan Ali, who has two. Base shipment levels per week vary from 100 to 560 for the contract drivers

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<sup>41[41]</sup> The Employer represented that Employer Exhibits 2 and 3 contained all the contracts, but the contracts for several contract drivers are missing.

with one route, while their base rates per shipment vary from \$1.55 to \$8.25 (for the contract driver whose base level is 100). Ali's base shipment level per week is 920 and his base rate is \$1.84.<sup>42[42]</sup> Other than Ali, contract drivers in Naples receive between \$775 and \$873 per week.<sup>43[43]</sup>

Feast testified that, within the past year, the Employer posted a notice at its Naples facility announcing that drivers would no longer have more than one route, and that those who already did (Ali and Arnold) would be grandfathered.<sup>44[44]</sup> Mitchell testified that about two and one-half years ago, the Sarasota station manager denied his request for a second route and said no more contract drivers could have more than one route.

*Opportunity for Increased Compensation from the Employer*

O'Donnell testified that a contract driver can increase his income by soliciting new business within his geographical area. As explained, additional shipments above the base weekly level are compensated at the threshold rate of \$.20 per shipment (except for the two contracts with the threshold rate of \$.01). Employer witness Arnold, who has three routes, testified that he doubled or tripled his base shipment level per week over a period of two and one-half years by soliciting customers for more shipments. He testified that in doing so, he needed the help of a sales representative for DHL or Airborne Express<sup>45[45]</sup> because he was not familiar with the pricing policy.

Several contract drivers testified that the threshold rate is so low, it is not worth the extra time and added expense of increased driving required for them to exceed their

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<sup>42[42]</sup> The Sarasota contract with a base rate per shipment of \$8.50 has a threshold rate per shipment of \$.01, as does the Naples contract with a base rate per shipment of \$8.25. These are the only two contracts with threshold rates other than \$.20.

<sup>43[43]</sup> Although O'Donnell testified that compensation ranges from the mid-\$800s to \$2,800 per week, the contracts in evidence demonstrate that the range is far narrower, that no contract drivers receive less than \$775 per week and that only the two contract drivers with multiple routes receive more than \$900 per week.

<sup>44[44]</sup> Arnold testified that he is the only Sarasota contract driver with more than one route.

<sup>45[45]</sup> It appears that the Employer had previously contracted with Airborne Express, which was acquired by DHL in 2003.

base shipment levels per week. Pierre, Mitchell and Dingley testified that increased gas and other driving expenses offset the income from shipments compensated at the threshold rate. As previously mentioned, Feliciano testified that shortly after he increased his volume of weekly shipments by soliciting business from a customer, the Employer reduced his base rate per shipment, causing him to lose \$1,500 per month. When he complained, the station manager at the time told him to accept the decrease or work somewhere else.<sup>46[46]</sup> Mitchell's base shipment level increased from 450 in the contract he signed on December 11, 2003, to 540 in the contract he signed on May 4, 2005; his base rate per shipment decreased from \$1.78 to \$1.62 in these two contracts.

O'Donnell testified that when a contract driver's geographical area adds a large volume of shipments, the Employer reconfigures his route and geographical area to ensure his ability to meet delivery priorities. He testified that the Employer reconfigures routes regardless of whether the contract driver solicited the new business or DHL targeted the contract driver's area for a sales campaign. He further testified that the Employer reconfigures the routes of employee drivers for the same reasons. O'Donnell testified that the Employer modifies contracts based on increased volume roughly once every six months or year.<sup>47[47]</sup>

#### *Opportunity for Outside Income*

There was contradictory testimony as to whether or not contract drivers can use their vehicles for other business purposes. Direction of Operations O'Donnell testified that contract drivers are allowed to use their vans for any outside business purpose, including a competing delivery service, as long as they cover up the DHL logo and

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<sup>46[46]</sup> Feliciano brought his concerns to the attention of DHL, after which the Employer restored \$200 per month.

<sup>47[47]</sup> It is not clear from the record whether he was referring to reconfiguration or recalibration of the base rate per shipment and base weekly level of shipments.

decals. Drivers testified otherwise, particularly with respect to using their vans for a competing delivery service.<sup>48[48]</sup>

Arnold testified that he told the Employer he plans to start a shutter business and a courier service with friends while maintaining his contract.

Several contract drivers testified that they have no time to pursue outside business opportunities during the day because of their tight delivery and pickup schedules.

Contract drivers are permitted to incorporate; one contract driver in Naples has operated a cleaning company and this company name appears on his contract with the Employer.

#### *Cover Drivers and Helpers Hired by Contract Drivers*

A contract driver can hire a cover driver to drive his route.<sup>49[49]</sup> As mentioned, a contract driver must provide a cover driver when absent, or incur financial penalties. Like employee drivers, contract drivers must contact a supervisor or station manager when absent without notice.

The contract driver hires his cover driver, determines his compensation and benefits and decides whether to terminate him. The cover driver must pass the same background and drug tests as other drivers. The contract driver is responsible for the cover driver's tax withholding and workers' compensation.

With respect to the hiring of cover drivers by contract drivers, O'Donnell testified that the Employer has rejected cover drivers, and "has some discretion" as to who is hired as a cover driver. He testified that the Employer rejects cover drivers who fail the background records checks or the drug test, and cover drivers with whom the Employer

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<sup>48[48]</sup> In view of the size of the "DHL" name and logo on the vehicles, "covering up" seems difficult, if not impossible. In its brief, the Employer appears to concede that the vans may not be used for competing delivery services.

<sup>49[49]</sup> At the hearing, the Employer took the position that cover drivers (or helpers) hired by contract drivers are not employees of the Employer.



previously had a “bad experience.” Mitchell and Feast testified that supervisors at their respective stations have rejected cover drivers they wanted to hire, without explanations.<sup>50[50]</sup>

A cover driver must drive an approved van and wear the approved DHL uniform.<sup>51[51]</sup> With respect to direction of work, O'Donnell testified that cover drivers are expected to check their scanners and otherwise follow the same procedures as contract drivers. It is not clear from the record whether cover drivers who substitute for absent contract drivers normally check in with the Employer's supervisors or with the contract driver for whom they are substituting. Sarasota contract driver Mitchell testified that a cover driver reports to the contract driver who hired him, but that if the contract driver is not available, the cover driver reports to the Employer's supervisors.

The record does not reflect the frequency with which most contract drivers use cover drivers. O'Donnell testified that some contract drivers have done so only once, while others do so “more regularly.”<sup>52[52]</sup> Feast has used cover drivers several times. Dingley used a cover driver once every six months. Mitchell has used a cover driver once. On the other hand, Arnold regularly employs three cover drivers on a rotating basis to drive two of his three routes, and drives the third route himself. He testified that he believed a majority of Sarasota contract drivers have used a cover driver “in the past and present,” but did not elaborate.

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<sup>50[50]</sup> Feast testified that “years ago,” the Employer told her a particular cover driver could not cover her route again after he failed to pick up a package when covering for her. She also testified that the Employer did not explain its decision.

<sup>51[51]</sup> It appears from the record that DHL provides uniforms free of charge to cover drivers.

<sup>52[52]</sup> O'Donnell testified that the frequency of using cover drivers “could be” between 10 and 80 per cent “of the time,” but did not explain what he meant, or how he arrived at these estimates.

Contract drivers can also hire helpers to assist in loading and unloading, though not to drive.<sup>53[53]</sup> O'Donnell testified that this is rare. The record does not contain evidence of a contract driver hiring a helper.

### **Driver Control of Work**

#### *Supervisory Direction*<sup>54[54]</sup>

In theory, drivers can deliver and pick up packages in any order they choose using any routes,<sup>55[55]</sup> as long as they meet their delivery and pickup priorities. In practice, most contract drivers testified that DHL's scheduling priorities leave them little or no discretion. Pierre testified that after he missed a noon delivery deadline because he first delivered a package due at 5:00 p.m. to a customer located near his 10:30 a.m. delivery, his supervisors instructed him to deliver packages in the order in which they are scheduled for delivery. Dingley testified that he was reprimanded for delivering packages due later before those due earlier.<sup>56[56]</sup>

Some contract drivers testified that supervisors direct them in detailed ways.

Pierre testified that he was instructed to deliver packages assigned to another driver's route that he mistakenly placed in his van during the morning sort,<sup>57[57]</sup> as well as packages not due until the following day. He testified that supervisors prohibited him from stopping for breakfast before his first delivery and required him to return to a customer to pick up packages that the customer forgot to give him earlier in the day. Pierre also testified that when a customer told him to leave packages at a particular

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<sup>53[53]</sup> Helpers must wear the same uniforms as drivers.

<sup>54[54]</sup> The record does not reflect how employee drivers are directed aside from their coverage under the Employer's disciplinary policies discussed below.

<sup>55[55]</sup> As mentioned, both contract drivers and employee drivers are allowed to take breaks when they choose.

<sup>56[56]</sup> Only contract driver Arnold testified that he decides the order of his deliveries, within the limits imposed by their priorities.

<sup>57[57]</sup> Dingley also testified that the Employer required him to deliver packages that he accidentally put in his van.

location and then changed its mind, his supervisor said that if he did not move the packages as requested by the customer, the Employer would take adverse action. Feast testified that she was similarly required to take a package that a courier had left at the wrong location to a different location; she testified that Sloan refused to compensate her at the courier's rate. Pierre testified that when he returned to the station after the DHL truck had left for the airport, Sloan directed him to catch up with the truck.<sup>58[58]</sup> Feast testified that Sloan required her to return to the Naples station to remove her pickups in time for the airport truck, and then go back out to deliver her remaining packages.

Feast testified that, roughly three weeks before the hearing, Sloan told her, "I insist on how you do every aspect of your job and you can quote me on that, that I control how you do every part of your job."

Mitchell testified that Sarasota drivers are required to attend morning meetings about once every two weeks before leaving on their routes.<sup>59[59]</sup> Arnold, who has the three routes, testified that he misses these meetings frequently without consequence.

#### *Driver Discipline*

After completing their 90-day probation, employee drivers receive a series of six documents containing "company policies," including four documents they must sign (collectively, the Employee Handbook).<sup>60[60]</sup> One document in the Employee Handbook lists offenses resulting in discharge. Another contains some offenses for which the Employer issues warning letters. Other documents in the Handbook explain that employee drivers can be discharged if found "at fault" for accidents exceeding a certain

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<sup>58[58]</sup> As mentioned, drivers are required to return to the station before the DHL trucks leave for the airport and other DHL facilities, and drivers must be checked in by a supervisor before going home.

<sup>59[59]</sup> Mitchell testified that these meetings generally address service levels.

<sup>60[60]</sup> O'Donnell testified that these six documents taken together comprise the Employee Handbook, although this label does not appear on the documents.

monetary level and frequency, list requirements for the care of vans, and set forth safety policies, such as driving tips and what to do if involved in an accident.

O'Donnell testified that contract drivers are not subject to the policies set forth in these documents and do not receive discipline. However, he also testified that contract drivers can be "admonished" for repeated tardiness, and that the Employer will declare a material breach and terminate a contract if a contract driver is at fault in failing to meet DHL's scheduling deadlines, such as from chronic lateness.

Feast testified that she was told to report by 7:30 a.m. in Naples, and that station manager Sloan threatened to terminate her contract for being late. She testified that she was late after receiving these warnings, though the record does not reflect whether Sloan or a supervisor knew of this tardiness. Pierre testified that a prior Naples station manager verbally reprimanded him for being late. Mitchell testified that Sarasota supervisors require all drivers to report by 6:00 a.m. on Mondays, by 7:30 a.m. on Tuesdays through Fridays, and by 8:15 a.m. on Saturdays. He testified that when he was late, a supervisor told him that he was not a "team player."

Feliciano testified that he was sent home for one day by supervisor Barnett, when he refused to remove a tee-shirt with words on it that Barnett deemed inappropriate, which he wore in the warehouse. However, Feliciano was paid for the day he was sent home.<sup>61[61]</sup>

#### *Contract Terminations*

There is no evidence that contract drivers have terminated their contracts because they determined that the Employer had committed a material breach.

O'Donnell testified that the Employer has terminated between 5 and 12 contracts in the past year at Sarasota and Naples combined, for reasons varying from theft and violence

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<sup>61[61]</sup> Feliciano was also placed on probation for 30 days after throwing DHL items out of his van during an argument with a supervisor. However, he testified that he was told he was on probation by a DHL manager.

to the Employer's determination that "this isn't a person that we want to continue to do business with."

O'Donnell terminated Dingley's contract pursuant to the 30-day "without cause" provision.<sup>62[62]</sup> Dingley testified that the day before this happened, O'Donnell warned him to replace his tires within one day or his van would not be allowed in the station and he would be terminated for abandoning his route. Dingley objected but replaced his tires as required; the next day, O'Donnell terminated his contract anyway. Dingley asked why. O'Donnell said that the Employer chose to no longer do business with him.

#### *DHL Performance Requirements*

DHL audits the Employer to ensure compliance with a variety of its performance standards in addition to pickup and delivery priorities. The Employer distributes DHL's audit manuals periodically to all drivers to prepare for audits. The manuals detail the "vehicle image" and "driver image" requirements. DHL maintains a "30-day board" at both stations that exempts slightly damaged vans for 30 days after the damage is incurred. If the damage is recorded and DHL audits within 30 days, the damage is excused. DHL also imposes specific package handling procedures. Residential customers do not have to sign for deliveries; with the proper advanced documentation, the driver can leave the package if the resident is not home. Commercial customers have to sign for deliveries.

### **Analysis and Conclusions**

#### ***Independent Contractor Issue***

Section 2(3) of the Act excludes from the definition of "employee" "any individual having the status of independent contractor." In determining whether an individual is an employee or an independent contractor, the Board applies the common law agency

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<sup>62[62]</sup> The record does not reflect when this occurred. Dingley worked as a contract driver for two to three years.

test.<sup>63[63]</sup> This test examines the following factors: (1) the control exercised by the employing entity over the details of the work; (2) whether the individual is engaged in a distinct occupation or business; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools and place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business.

In applying these factors, the Board considers all the incidents of the individual's relationship with the employing entity, with no single factor being decisive. The same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors.<sup>64[64]</sup> The burden of proof is on the party asserting the independent contractor status.<sup>65[65]</sup>

I conclude that the Employer has failed to meet its burden of establishing that the contract drivers at the Sarasota and Naples stations are independent contractors, and, with the exception of the Arnold and Ali, shall include them in the unit. Although I recognize that some factors support a finding of independent contractor status for the contract drivers, they are significantly outweighed by factors showing that these contract drivers are not independent contractors.<sup>66[66]</sup>

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<sup>63[63]</sup> See Roadway Package System, Inc., 326 NLRB 842, 850 (1998) and Dial-A-Mattress Operating Corp., 326 NLRB 884, 891 (1998), two of the lead cases analyzing the status of drivers as employees or independent contractors.

<sup>64[64]</sup> Roadway Package System, Inc., 326 NLRB at 850.

<sup>65[65]</sup> BKN, Inc., 333 NLRB 143, 144 (2001).

<sup>66[66]</sup> Although contract drivers are subject to the same criminal and driving records check and drug test as employee drivers, when such requirements are imposed by governmental

The Employer exercises extensive control over the work performed by contract drivers. Like employee drivers, they must arrive every morning before the morning sort, search the sorting belt for all packages addressed to their geographic area, scan them, load them, and deliver them within DHL's scheduling priorities, which are no different for contract drivers than employee drivers. Contract drivers cannot leave on their routes until the supervisor gives the signal, just like employee drivers. They have to make pickups within the same time windows as employee drivers. Contract drivers have to return to the station in time to place their pickups on the sorting belt before trucks depart for the airport and sorting centers. They cannot leave until the station manager or a supervisor checks them in. They use the same scanners<sup>67[67]</sup> and computers and wear the same uniforms as employee drivers. Contract drivers must call in when sick, just like employee drivers. The Naples station manager told a contract driver that he controls how she does every part of her job. In short, the essential aspects of the contract driver's daily routine do not distinguish them from employee drivers.<sup>68[68]</sup>

Several contract drivers supplied testimony illustrating how closely the Employer controls even the minutia of their work.<sup>69[69]</sup> Supervisors required a contract driver in Sarasota and another in Naples to move packages from one location to another at their customers' requests, even though they were not responsible for the errors. Supervisors

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regulations, the Board has held that they generally do not constitute control by the employer. Elite Limousine Plus, Inc., 324 NLRB 992 (1997).

<sup>67[67]</sup> The fact that contract drivers pay for their scanners is not of great relevance. They must use the Employer's scanner and return it every night, so they cannot use them for other businesses.

<sup>68[68]</sup> See Corporate Express Delivery Systems, 332 NLRB 1522 (2000): "[O]wner-operators perform work which is substantially the same as that of employee drivers and constitutes the essential functions of the Respondent's normal operations as a package pickup and delivery service ... They are trained by the Respondent ... and they do business in the Respondent's name with substantial guidance from and control of the Respondent."

<sup>69[69]</sup> In Time Auto Transportation, Inc., 338 NLRB 626 (2002), involving long-haul truck drivers whom the Board found to be statutory employees, dissenting Member Bartlett contrasted the requirement that owner-operators check in with the dispatcher each day, which he found was a "commonsense measure," with the close control exercised over parcel pickup and delivery drivers in Corporate Express Delivery Systems.

required two Sarasota contract drivers to deliver packages on another driver's route, after they accidentally took them at the morning sort. A Naples contract driver was required to return before completing her route so she could unload before the airport truck departed, and then complete her route. A Sarasota contract driver was required to catch up with the airport truck after returning late from his route.

Although there was some testimony that contract drivers may sometimes refuse deliveries, there is no evidence that this has occurred; it is unlikely in any event, since the contract driver incurs a financial penalty and the Employer may terminate his contract if he does so repeatedly. While contract drivers are theoretically free to choose the sequence and routes to drive for their deliveries, DHL's scheduling deadlines sharply limit them in this regard, and there was testimony that contract drivers have been instructed to the contrary.

The skills required are the same for a contract driver as for an employee driver. Although employee drivers receive training in use of the Employer's van and fuel card, driving a van does not require special training or licensure,<sup>70[70]</sup> and the fuel card is not an essential feature of the employee driver's job. Although employee drivers undergo a 90-day probationary period while contract drivers are trained during the 10-day familiarization period, the Employer delays executing a contract with new contract drivers during the "penny period," which can last up to three months and during which the contract driver receives a fixed compensation. Thus, contract drivers do not "sink or swim" after 10 days, but transition to contract status in the same way employee drivers transition to permanent status.

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<sup>70[70]</sup> See e.g. Capital Parcel Delivery Co., 256 NLRB 302, 313 (1981).



Contract drivers do not negotiate with the Employer and have no meaningful input into their contracts.<sup>71[71]</sup> The Employer unilaterally determines the monetary terms: the base shipment level per week, base rate per shipment and threshold rate per shipment.<sup>72[72]</sup> This factor weighs in favor of a finding of employee status.<sup>73[73]</sup> Weekly compensation appears to vary within a narrow range that is very similar at both locations.<sup>74[74]</sup> The Employer unilaterally restructures the monetary terms of the contract when it unilaterally reconfigures a contract driver's route or geographical area.<sup>75[75]</sup> The Employer unilaterally determines whether to penalize a contract driver for late deliveries by deciding whether it was caused by circumstances beyond the contract driver's control. Contract drivers cannot alter the other performance terms of their contracts, such as on-demand pickups and deliveries.

Contract drivers also have no proprietary interest in their routes.<sup>76[76]</sup> Routes do not vary based on whether the driver is an employee or contract driver, and contract drivers cannot bid for routes, trade or sell them. The Employer structures the contract driver's compensation in a manner that effectively discourages them from attempting to increase their base shipment levels per week. It appears that for most contract drivers, the insignificant threshold rate of \$.20 (or \$.01) per shipment for shipments exceeding the base weekly level does not offset the increased gas and van expenses incurred to

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<sup>71[71]</sup> Time Auto Transportation, Inc., 338 NLRB at 637. Compare Dial-A-Mattress Operating Corp., 326 NLRB 885, 892 (1998) (successful negotiation of altered compensation terms by owner-operators supports finding of independent contractor status).

<sup>72[72]</sup> The Employer identified no instances when contract drivers negotiated these figures.

<sup>73[73]</sup> Roadway Package System, 326 NLRB at 852. See also Corporate Express Delivery Systems, 332 NLRB at 1524.

<sup>74[74]</sup> The Employer cites Young & Rubicam International, 226 NLRB 1271 (1976) for the proposition that payment according to a formula based on the number of shipments rather than an hourly or salary basis indicates that contract drivers are independent contractors. However, the formula used to determine the compensation for the professional freelance photographers in Young & Rubicam International was based on a variety of factors absent here, and method of payment is, of course, only one factor to consider.

<sup>75[75]</sup> The Employer does the same for employee drivers, further demonstrating the similar control it exercises over both types of drivers.

<sup>76[76]</sup> Corporate Express Delivery Systems, 332 NLRB at 1522; Roadway Package System, 326 NLRB at 852-853.

make these shipments. Significantly, when a contract driver adds shipments to substantially increase his base weekly level, the Employer reconfigures his route to assure compliance with DHL priorities, which effectively limits that contract driver's compensation. Also, the Employer appears to unilaterally decide the base rates per shipment in a manner that effectively limits compensation. Thus, when two contract drivers increased their base weekly shipment levels, their base rates per shipment were decreased.<sup>77[77]</sup> The Employer told one of these contract drivers to accept the change or work elsewhere.<sup>78[78]</sup> In short, the contract driver's compensation does not "depend largely on [his] ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase [his] profits."

Roadway Package System, 326 NLRB at 852, quoting Standard Oil Co., 230 NLRB 967, 972 (1977).<sup>79[79]</sup>

As in Roadway Package System, Inc., the predetermined base shipment level per week and base rate per shipment serve as "an important safety net" that "shields [the contract driver] from loss, and it guarantees an income level predetermined by" the Employer, "irrespective of the [contract driver's] personal initiative and effort in his service area." 326 NLRB at 853. Since the Employer sets the base weekly level of

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<sup>77[77]</sup> Compare Roadway Package System, 326 NLRB at 852: "Generally speaking, there is little room for the drivers to influence their income through their own efforts or ingenuity. Whatever potential for entrepreneurial profit does exist, Roadway suppresses through a system of minimum and maximum number of packages and customer stops assigned to the drivers. **For example, when a driver becomes busier and the number of packages or customer stops grows, his territory may be unilaterally reconfigured...**" (emphasis added)

<sup>78[78]</sup> Although the Employer restored some of this contract driver's decrease, it did so only after the contract driver complained to DHL rather than as the result of a negotiation process.

<sup>79[79]</sup> The Employer cites Bellacicco & Sons, Inc., 249 NLRB 877 (1980) in support of its contention that contract drivers have the opportunity to increase their earnings by adding customers. However, the drivers at issue in Bellacicco & Sons, Inc. purchased from the employer the exclusive right to distribute the employer's bread products within a specific geographical area or route, and drivers could trade routes, use them as collateral and sell them to third parties. Drivers were also permitted to distribute the bread products of competing companies. These factors gave the drivers a significant proprietary interest in their routes, unlike in the present matter.

shipments at the level it decides the contract driver is “definitely going to achieve,”<sup>80[80]</sup> the contract driver appears to be guaranteed weekly compensation equal to the base shipment level per week multiplied by the base rate per shipment.

Contract drivers also have little effective chance to augment their compensation through outside business pursuits. Their daily routine begins when they arrive before the morning sort (7:30 a.m. in Sarasota and 8:00 a.m. in Naples), and ends when they return before DHL trucks leave for the airport and other facilities (7:30 to 8:00 p.m.). They work on Saturdays, although on that day of the week, they finish their work by early afternoon. While the record contains conflicting evidence as to whether contract drivers are permitted to use their vans for other delivery services, none do so. At a minimum, the Employer requires contract drivers to cover the DHL logo and lettering if using their vans for this purpose. There is no evidence in the record that any contract driver currently uses his or her van for another business.<sup>81[81]</sup>

Under these circumstances, the Board has recognized that a contractual right to engage in outside business falls within the category of “entrepreneurial opportunities that [contract drivers] cannot realistically take.”<sup>82[82]</sup> As with the drivers at issue in Roadway Package System, Inc., the schedules of contract drivers “for all practical purposes”<sup>83[83]</sup> prevent them from using their vans to pursue outside business opportunities.<sup>84[84]</sup>

Although employee drivers are subject to the Employee Handbook while contract drivers are not, two contract drivers were verbally warned about chronic tardiness, one of the bases for warning letters in the Handbook.<sup>85[85]</sup> While one of them was late again

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<sup>80[80]</sup> Director of Operations O’Donnell testified to this.

<sup>81[81]</sup> As noted previously, in its brief, the Employer appears to agree that the vans may not be used for competing delivery services.

<sup>82[82]</sup> Roadway Package System, Inc., 326 NLRB at 851 fn 36, quoting C.C. Eastern v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995), enf. denied and vacating 313 NLRB 632 (1994).

<sup>83[83]</sup> 326 NLRB at 851 fn 36.

<sup>84[84]</sup> Accord Slay Transportation Co., 331 NLRB 1292, 1294 fn 8 (2000).

<sup>85[85]</sup> Another was told by a supervisor that he was not a team player.

after being warned, the record contains no evidence that the Employer knew about it.<sup>86[86]</sup> Another contract driver was sent home for a day for wearing a tee-shirt the Employer considered inappropriate in the warehouse. As the Board has noted, “the exercise of discipline by the Employer over its drivers is another important factor indicative of employee status.”<sup>87[87]</sup> Further, the Employer has terminated several contracts without notice for offenses such as theft and violence, for which employee drivers can be summarily discharged.

Many of the factors present here were also present in Corporate Express Delivery Systems, 332 NLRB 1522 (2000), in which the Board concluded that owner-operator delivery drivers were statutory employees. As in that case, contract drivers must own their vans but must use them to perform the essential functions of the Employer’s operation under substantial guidance and control by the Employer; they work full-time and are trained by the Employer; they cannot negotiate their compensation; they must purchase the Employer’s van insurance and cargo insurance; they are required to display the Employer’s logo and decals on their vans and to wear DHL uniforms; they apparently cannot use their vans to deliver packages for other companies; they have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss; their routes, base pay and amount of freight to be delivered daily are determined by the Employer; they cannot sell their routes; and the Employer incurs no liability for unilaterally terminating their contracts.<sup>88[88]</sup> As in Corporate Express Delivery Systems, contract drivers sign agreements stating that they are independent contractors and provide documentation exempting them from workers’

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<sup>86[86]</sup> As mentioned, O’Donnell testified that chronic tardiness can also be the basis for the Employer to declare a material breach of a contract, leading to termination. The Handbook similarly lists this as a dischargeable offense.

<sup>87[87]</sup> Air Transit, Inc., 248 NLRB 1302, 1308 (1980). Accord Stamford Taxi, Inc., 332 NLRB 1372, 1373 (2000).

<sup>88[88]</sup> Corporate Express Delivery Systems, 332 NLRB at 1522.

compensation coverage, yet the Board in Corporate Express Delivery Systems found those factors not to be determinative.<sup>89[89]</sup> Also as in Corporate Express Delivery Systems, the Employee Handbook does not apply to contract drivers, yet there is evidence that they receive discipline.<sup>90[90]</sup>

While contract drivers supply their own vans and pay van expenses, that factor alone does not establish that they are independent contractors. As with the owner/operators found to be statutory employees in Community Bus Lines, 341 NLRB No. 61 (2004),<sup>91[91]</sup> the contract drivers' work "is the precise business of" the Employer. Moreover, the owner/operators in Community Bus Lines were deemed employees even though their vans were not uniform in color or style, and even though they were permitted to place their own names on their vehicles; as explained, contract drivers must conform their vans to the rigid DHL appearance requirements and are not permitted to place additional lettering on them and must purchase insurance through the Employer.<sup>92[92]</sup>

Argix Direct, Inc., 343 NLRB No. 108 (2004), is distinguishable in several respects. Significantly, the Argix owner-operators were not assigned to specific routes and were free to elect not to work on any given day without penalty.<sup>93[93]</sup> This enhanced their opportunities to pursue outside business interests. In contrast, The Employer's contract drivers work six days every week, are assigned routes and must provide cover drivers when absent. The Argix owner-operators were paid on a sliding scale

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<sup>89[89]</sup> 332 NLRB at 1524.

<sup>90[90]</sup> 332 NLRB at 1526.

<sup>91[91]</sup> Owner/operators were employees despite owning the vans and minibuses used by the employer to shuttle passengers.

<sup>92[92]</sup> Capital Parcel Delivery Co., 256 NLRB 302 (1981) was a similar case finding that owner-operators required to provide their own trucks were statutory employees. The employer contracted with Montgomery Ward and Company (Ward) to deliver furniture and appliances according to time schedules set by Ward, using trucks painted to Ward's specifications and personnel clothed as Ward's required. Although that case was decided under the "right to control" test, the Board based its decision on many of the same factors present here, such as the employer's unilateral control over its contract with owner-operators and the lack of opportunity for owner-operators to make decisions involving financial risk. 256 NLRB at 304.

<sup>93[93]</sup> 343 NLRB No. 108, slip op. p.3.

depending on the number of miles driven per day, and were therefore not guaranteed any income.<sup>94[94]</sup> Contract drivers, in effect, are guaranteed compensation for their base shipment level per week.

Additionally, the owner-operators in Argix Direct were not required to make unscheduled pickups, and their contract expressly reserved their right to provide service to competing carriers;<sup>95[95]</sup> contract drivers must make “on demand” pickups pursuant to their contract, which does not state that they may use their vans for competing package delivery companies. The employer in Argix Direct did not require its name, logo or decals to be on the trucks driven by owner-operators, who were free to place their own names and other lettering on them.<sup>96[96]</sup> Argix owner-operators could purchase their own nontrucking liability insurance.

Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998), is also distinguishable. Unlike the Employer’s contract drivers, the owner-operators in Dial-A-Mattress did not receive training from the employer, were not guaranteed a base level of compensation<sup>97[97]</sup> and did not have to conform their trucks to color and signage requirements.<sup>98[98]</sup> As mentioned, the employer in Dial-A-Mattress negotiated compensation terms with owner-operators. Unlike the contract drivers here, owner-operators were charged a fee for the use of the employer’s restroom and lounge facilities.<sup>99[99]</sup>

I recognize that certain factors support a finding that contract drivers are independent contractors, but these factors are outweighed by those showing that contract drivers are statutory employees. Although certain documents signed by them

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<sup>94[94]</sup> 343 NLRB No. 108, slip op. p.3.

<sup>95[95]</sup> 343 NLRB No. 108, slip op. p.3.

<sup>96[96]</sup> 343.NLRB No. 108, slip op. p.1.

<sup>97[97]</sup> 326 NLRB at 892.

<sup>98[98]</sup> 326 NLRB at 891.

<sup>99[99]</sup> 326 NLRB at 892. Many of these distinctions from Dial-A-Mattress were recognized by the Board in finding employee status in Slay Transportation Co., 331 NLRB at 1294.

identify contract drivers as independent contractors, this factor is not dispositive,<sup>100[100]</sup> and the Board looks behind the label to determine whether a relationship is in fact one of employer-employee.<sup>101[101]</sup> Additionally, contract drivers receive no benefits and for tax purposes have been treated by the Employer as independent contractors. While contract drivers are permitted to incorporate, the record indicates that only one has done so; and he did so in connection with a cleaning company. Since contract drivers cannot place lettering on their vans without covering the lettering prescribed by DHL and the Employer, their vans cannot realistically be used to promote an outside business.<sup>102[102]</sup>

Contract drivers are permitted to hire their own cover drivers and set their terms and conditions of employment. This factor supports an independent contractor finding.<sup>103[103]</sup> However, the Board does not consider the hiring of employees as dispositive.<sup>104[104]</sup>

Moreover, the Employer has input into the hiring of these cover drivers, inasmuch as it rejects cover drivers on occasion. It appears from the record that this happens mostly when the prospective cover driver fails the background checks or the drug test, but O'Donnell testified that the Employer also rejects cover drivers with whom it has had a bad experience. The absence of unilateral control over the hiring of employees dilutes the weight of this factor in evaluating whether contract drivers are independent

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<sup>100[100]</sup> Argix Direct, 343 NLRB No. 108, slip op. p. 6.

<sup>101[101]</sup> Dial-A-Mattress, 326 NLRB at 897 fn 2; Aetna Freight Lines, 194 NLRB 740, 741 (1971).

<sup>102[102]</sup> By contrast, in Dial-A-Mattress, owner-operators displayed their individual company's name, address and Department of Transportation number on their trucks.

<sup>103[103]</sup> 326 NLRB at 892.

<sup>104[104]</sup> Slay Transportation Co., 331 NLRB at 1294. See also R.W. Bozel Transfer, Inc., 304 NLRB 200, 201 (1991) (hiring of lumpers insufficient to establish that owner-operators are independent contractors); H & H Pretzel Co., 277 NLRB 1327, 1329 (1985) (ability to hire employees offset by other factors).

contractors.<sup>105[105]</sup> Also, with the exception of Arnold and Ali, it appears that contract drivers use cover drivers infrequently.

Unlike cases in which independent contractors own multiple vehicles and seek to profit by hiring employees to drive some of them, the record demonstrates that only two contract drivers own more than one van and are responsible for more than one route. By contrast, in Argix Direct, five owner-operators owned 20 of 63 owner-operator trucks, and those owning multiple trucks hired their own drivers.<sup>106[106]</sup> The Employer no longer permits other contract drivers to have more than one route,<sup>107[107]</sup> so it appears these two contract drivers will remain the only contract drivers who regularly hire cover drivers. For these reasons, the fact that the remaining contract drivers can hire cover drivers and helpers does not alone establish that they are independent contractors.

Based upon the foregoing and the record as a whole, I conclude that the Employer has failed to carry its burden of proof that the contract drivers in Sarasota and Naples are independent contractors. However, Arnold and Ali are discussed below.<sup>108[108]</sup>

### ***Supervisory Issue***

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline

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<sup>105[105]</sup> Time Auto Transportation, 338 NLRB at 638; Deaton, Inc., 187 NLRB 780, 781-782 (1971); compare Fort Wayne Newspapers, 263 NLRB 854, 855 (1982) (ability of distributors to unilaterally hire helpers and substitutes supports finding them independent contractors).

<sup>106[106]</sup> In Dial-A-Mattress, every owner-operator hired at least one employee without input from the employer, who did not need to know their identities. By contrast, the Employer requires all cover drivers to pass its background checks and drug test, and has rejected some.

<sup>107[107]</sup> Arnold and Ali are exempted and can keep their routes.

<sup>108[108]</sup> In 2002, the U.S. Equal Employment Opportunity Commission determined that a contract driver was an independent contractor for purposes of the statutes it enforces. In 2002 and 2004, the State of Florida determined that three contract drivers were independent contractors for purposes of unemployment compensation. The Board does not give controlling weight to determinations by other governmental agencies. Roadway Package System, 326 NLRB 842, 854 fn 46 (1998). Additionally, it appears that none of the contract drivers involved in the EEOC and unemployment compensation cases worked at the Sarasota or Naples stations, and the record does not reflect whether either the EEOC or the unemployment agency conducted a hearing.



other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need only possess one of the indicia of supervisory authority in order to meet the requirements of Section 2(11).<sup>109[109]</sup> Section 2(11) does not require that the individual routinely or regularly exercise this supervisory authority; it is the mere existence of the authority to exercise this power which determines whether the individual is a supervisor.<sup>110[110]</sup> The burden of proving supervisory status is on the party asserting such status.<sup>111[111]</sup>

For two reasons, contract drivers are not supervisors of the Employer within the meaning of Section 2(11) of the Act.

First, the Board holds that an individual does not exercise supervisory authority “in the interest of the employer,” within the meaning of Section 2(11), if he acts in his own interest. When using a cover driver (or helper) the contract driver acts in his own interest, not the interest of the Employer.

The contract driver receives compensation from the Employer based solely on his base level of shipments. To the extent that he pays part of that amount to a cover driver to drive his route, he receives less compensation. The contract driver foregoes this amount of compensation so that he can avoid the penalties that the Employer would otherwise impose pursuant to his contract for failing to meet DHL’s deadlines, such as the cost of renting a van or using an outside courier.

In Allstate Insurance Co., 332 NLRB 759, 760-761 (2000), the Board held that an insurance salesperson was not exercising supervisory authority in the interest of the employer because she had complete discretion as to whether to hire assistants, and

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<sup>109</sup>[<sup>109</sup>] Providence Hospital, 320 NLRB 717, 725 (1996).

<sup>110</sup>[<sup>110</sup>] Arlington Masonry Supply, 339 NLRB 817 (2003).

<sup>111</sup>[<sup>111</sup>] NLRB v. Kentucky River Community Care, 532 U.S. 706, 712 (2001).

compensated them out of her pocket. Significantly, all assistants had to be approved by the employer,<sup>112[112]</sup> just as cover drivers must be approved by the Employer here.

In Tiberti Fence Co., 326 NLRB 1043 (1998), the Board held that foremen who recommended wage increases for their helpers were not exercising supervisory authority in the interest of their employer because these increases were subtracted from the foremen's pay. The Board concluded that the foremen's wage recommendations were rooted primarily in their own interest, to ensure a harmonious, continuing working relationship with the helpers. The employer retained ultimate authority over the granting of raises for helpers, just as the Employer can reject cover drivers; the Board stated that it saw "no inconsistency in the foremen's acting principally in their own interests in seeking wage increases for their helpers and in the Employer's retaining ultimate say over the granting of raises." 326 NLRB at 1043 fn 3.<sup>113[113]</sup>

Second, these cover drivers hired by the contract drivers are not employees of the Employer. Thus, contract drivers do not supervise employees of the Employer.<sup>114[114]</sup>

Any supervisory authority that the Employer exercises over cover drivers would be as a joint employer with the contract driver who hires, pays and can terminate the cover driver. Under established Board precedent, two or more entities are joint employers when they share and codetermine matters governing essential terms and conditions of employment.<sup>115[115]</sup> The employers must meaningfully affect matters relating to the employment relationship, such as hiring, firing and discipline.<sup>116[116]</sup>

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<sup>112[112]</sup> 332 NLRB at 761 fn 6.

<sup>113[113]</sup> Accord Distillery Workers v. NLRB, 298 F.2d 297, 302-305 (D.C. Cir. 1961), cert. denied 369 U.S. 843, enf 127 NLRB 850, 858-861 (1960) (driver-salesmen who hire helpers to service their routes more efficiently, and pay helpers entirely from their own commissions, exercise supervisory authority in their own interest, not that of their employer.) See also Wells Dairies Cooperative, 109 NLRB 1450, 1451-1452 (1954).

<sup>114[114]</sup> As noted previously, the Employer took the position at the hearing that cover drivers and helpers hired by contract drivers are not its employees.

<sup>115[115]</sup> NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982).

<sup>116[116]</sup> Riverdale Nursing Home, 317 NLRB 881, 882 (1995).

The only evidence that cover drivers are employees of the Employer is that the Employer occasionally rejects a cover driver. There is insufficient evidence that the Employer exercises other indicia of supervisory authority over cover drivers; the contract driver does so. In this regard, the record does not establish that the Employer meaningfully directs the work of cover drivers, just that cover drivers are expected to follow the same procedures as contract drivers. For example, it appears that if a cover driver leaves the sorting belt too early in the morning, and thereby fails to deliver a package on his route, the penalty is assessed by the Employer against the contract driver for whom he is covering.<sup>117[117]</sup>

To the extent that the Employer rejects cover drivers because they fail the background checks and drug tests required by governmental regulation, the Board does not consider such an exercise of authority as evidence of joint employer status. This is because, in determining whether an employer is a joint employer, the Board does not rely on evidence that the employer “exercised responsibilities derived by virtue of regulation or statute.”<sup>118[118]</sup>

I recognize that the Employer apparently rejects some cover drivers based on its prior experience with these individuals. However, the only evidence of this in the record is testimony by one contract driver regarding an incident “years back,” and a former contract driver’s testimony that he was denied permission to serve as a cover driver after his contract was terminated. This evidence is insufficient to establish that the Employer exercises supervisory authority over cover drivers.

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<sup>117[117]</sup> Additionally, the Board does not consider “isolated, occasional and routine direction” enough to establish joint employer status. The Painting Co., 330 NLRB 1000, 1007 n 14 (2000); see also International Shipping Association, 297 NLRB 1059, 1067 (1990).

<sup>118[118]</sup> Aldworth Co., 338 NLRB 137, 140 (2002).

In sum, I find that cover drivers hired by contract drivers are not employees of the Employer, and that contract drivers are not supervisors within the meaning of Section 2(11) of the Act.<sup>119[119]</sup>

### **Contract Drivers Arnold and Ali**

I shall permit contract drivers Arnold and Ali to vote subject to challenge. They each have more than one route, unlike other contract drivers who are no longer permitted to have multiple routes. The facts presented with respect to Arnold and Ali raise community of interest concerns, but their distinct situations were not directly addressed by the parties.<sup>120[120]</sup>

### **Conclusions and Findings**

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.<sup>121[121]</sup>

C. The Petitioner claims to represent certain employees of the Employer.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1), and Section 2(6) and (7) of the Act.

E. The following employees constitute separate units<sup>122[122]</sup> appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>119[119]</sup> In its brief, Petitioner argues that the cover drivers hired by contract drivers should be included in the respective units. As I find that they are not employees of the Employer, they shall not be included.

<sup>120[120]</sup> The facts weigh more strongly in favor of finding them to be independent contractors as well.

<sup>121[121]</sup> Hilson & Fergusson, Inc. and HFH, Inc. (the Employer), are each Florida corporations with a principal office and place of business located at 1007 Oceanwalk Drive, Fernandina Beach, Florida and with places of business located at 725 Tallevast Road, Sarasota, Florida and 3503 Westview Drive, Naples, Florida, where they are engaged in the business of picking up and delivering packages and parcels.

**Unit A:** All full-time and regular part-time drivers, including contract drivers, and dock workers employed by the Employer at its facility located in Sarasota, Florida, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.<sup>123[123]</sup>

**Unit B:** All full-time and regular part-time drivers, including contract drivers, and dock workers employed by the Employer at its facility located in Naples, Florida, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.<sup>124[124]</sup>

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local 79, AFL-CIO. The dates, times, and places of the elections will be specified in the Notices of Election that the Board's Regional Office will issue subsequent to this Decision.

## **Voting Eligibility**

Eligible to vote in the elections are those in the units who are employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers, but who have been permanently replaced, as well as their replacements, are eligible to vote.

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<sup>122[122]</sup> Apart from the inclusion of contract drivers, the unit descriptions appear as stipulated to by the parties.

<sup>123[123]</sup> Contract driver Michael Arnold shall vote subject to challenge, if he chooses to vote. Cover drivers hired by contract drivers are excluded from the unit.

<sup>124[124]</sup> Contract driver Shahzaan Ali shall vote subject to challenge, if he chooses to vote. Cover drivers hired by contract drivers are excluded from the unit.

Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit Lists of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 N.L.R.B. 1236 (1996); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for each unit containing the full names and addresses of all eligible voters. North Macon Health Care Facility, 315 N.L.R.B. 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized. Upon receipt of the lists, I will make them available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before June 10, 2005. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file these lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be made available to all parties to the

election, please furnish a total of **two** copies of each.<sup>125[125]</sup> If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 N.L.R.B. 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **June 17, 2005**. The request may not be filed by facsimile.<sup>126[126]</sup>

Dated at Tampa, Florida, this 3rd day of June, 2005.

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<sup>125[125]</sup> The lists may be submitted by facsimile transmission to (813) 228-2874, or electronically to [Region12@nrlrb.gov](mailto:Region12@nrlrb.gov), as well as by hard copy. Only one copy of each should be submitted if the lists are sent electronically or by facsimile.

<sup>126[126]</sup> In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board's office in Washington, D.C. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: [www.nrlrb.gov](http://www.nrlrb.gov).

201 E. Kennedy Boulevard, Suite 530

/s/[E]  
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Nati  
Tan

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